SUPREME COURT, U. S.

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# In the Supreme Court of the United States

OCTOBER TERM, 1969 No. 997

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ASSOCIATED TRUCK LINES, INC., ET AL.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, ET AL.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

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## MOTION TO AFFIRM

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## MOTION TO AFFIRM

Pursuant to Rule 16 (1) (c) of the Rules of this Court, the National Furniture Traffic Conference, Inc., moves that the judgment of the district court be affirmed.

## STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J. S. App. A) dismissing the appellants suit to set aside and annul a report and order of the Interstate Commerce Commission (J. S. App. B, 332 ICC 802) which required Associated Truck Lines, Inc. (Associated) to cancel a tariff rule which reads as follows:

> Associated Truck Lines, Inc., maintains no through routes, joint rates or interchange arrangements on shipments of furniture as described in items 79000 through 83650 in NMFC.

This tariff provision became effective on July 2, 1966, and was contained in paragraph (b) of item 545-k in

Central & Southern Class Tariff supplement 95 to tariff 100-D, MF-ICC 287. This is a reissue of an item which first became effective on May 1, 1966. There has since been another reissuance as more fully explained in the appendix of the report and order of the Interstate Commerce Commission (332 ICC at 818, J. S. 27a).

Prior to the publication of the above-described tariff rule, Associated had agreements with other carriers for through routes and joint rates for the transportation of general commodities, including furniture, between the Central States area and the Southern area (J. S. App. A, 1a).

In 1965, Associated published tariff restrictions and a cancellation of the line rate schedule on shipments of furniture. (J. S. App. A, 2a.) Shippers would then have been charged the higher combination of local rates on through routes. The Interstate Commerce Commission, after due consideration, found that the higher combination rates were not just or reasonable.[2] Thereafter, Associated published the above-described tariff rule cancelling all through routes and joint tariff arrangements on shipments of furniture between the Central States territory and Southern territory.

Following publication of the above-described tariff rule, the National Furniture Traffic Conference, Inc. (N.F.T.C.) filed a formal complaint with the Commission challenging the lawfulness of Associated's tariff restriction on furniture. The matter was assigned for handling under modified procedure on written statements of fact and argument. The Hearing Examiner found that the tariff restriction was not unlawful and recommended that the

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[2] Docket No. M-19650, Furniture Restrictions Between Central & Southern States (not printed) decided September 20, 1965.

complaint be dismissed. This recommendation was approved by Review Board No. 4 and by Division 2 of the Commission acting as an appellate division. N.F.T.C. then filed a petition for reconsideration which was denied. A second petition, based on the ground that the issue involved was one of general transportation importance, was granted. The full Commission then reversed the Examiner and the Review Board. The Commission found that the restrictive tariff provision was unlawful and ordered the restoration of through route, joint rate and interchange arrangements for shipments of furniture.[3]

The Commission found that Associated's selective cancellation of through routes, joint rates and interchange arrangements on furniture clearly placed furniture shippers in a disadvantaged position relative to other general commodities, and found such disadvantage to be undue and unreasonable, and hence unlawful under Section 216 (b), (c) and (d) of the Interstate Commerce Act, 49 U.S.C. § 316 (b), (c) and (d) (332 I.C.C. 812–814 J. S. 19a–23a).

The Commission found that this selective cancellation of the through routes and joint rates would not only require a furniture shipper "to pay a combination of two local rates (rather than a lower single-factor rate), but would also . . . put (the shipper) to the expense (and subjected to the attendant delay) of arranging to have a warehouseman or other person at the point of interchange act as his agent in accepting the shipment from Associated and forwarding it on a new bill of lading." (332 I.C.C. at 808, 809, J. S. 14a–16a.)

Furthermore, the Commission found that routing shipments and processing damage claims would be further complicated. (332 I.C.C. at 812, J. S. 19a–20a.)

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[3] Docket No. 34815, National Furniture Traffic Conferencers. Associated Truck Lines, Inc., December 31, 1968.

The Commission found that the total effect of the restrictive tariff provision will be to restrict the movement of furniture to those territories where single-line service is available. (332 I.C.C. at 812, J. S. 19a.) The Commission concluded that the segmented and regionalized transportation system which will develop from this restrictive tariff rule thus permits Associated selectively to encourage only that traffic which Associated believes more desirable and lucrative. (332 I.C.C. at 812, J. S. 20a.)

The Commission then found that such a selective tariff will prejudice furniture shippers relative to other general commodity shippers and was contrary to Associated's duty to observe reasonable practices and its duty not to put any shipper at an undue and unreasonable disadvantage. (332 I.C.C. at 812–814, J. S. 20a–22a.)

In a concurring opinion, Commissioner Tuggle found that Associated's action was unduly discriminatory because it gave an unreasonable economic advantage to furniture shippers who required only Associated's single-line service to reach a market. Those shippers still received this service, while those shippers who had used Associated's interline service to market their goods were faced with higher costs and added shipping complications. The result of this practice would be to force the latter shippers out of the market, thus benefiting their single-line competitors. Furthermore, this tariff rule would prejudice shippers between Southern and Central territories, who no longer have Associated's interline service available, "whenever they compete at points with shippers from other territories who need (Associated's) interline service and have it available." (332 I.C.C. at 815, 816, J. S. 23a–25a.) Thus, this tariff rule's failure to provide equal treatment to competing traffic required the finding that this tariff was unlawful.

The district court unanimously sustained the Commission's decision, declaring that ". . . we find substantial evidence, considering the record as a whole, to support this finding of the Commission." (J. S. 5a.)

## ARGUMENT

This appeal presents no substantial question warranting plenary review, and the judgment below should be affirmed.

1. The argument that the court below failed to consider and decide the question of whether the Commission's action herein exceeds its statutory authority is without merit. The court below found that the Commission acted pursuant to the provisions of Sections 216 (b), (c) and (d) of the Interstate Commerce Act, 49 USCA § 316 (b), (c) and (d) (J. S. 3a). The court below further found substantial case authority in support of Commission activity to prevent or correct unreasonable practices and undue preferences, prejudices and disadvantages created by regulated common carriers. *American Trucking Association V. A. T. & S. F. R. Co.* 387 U. S. 399 (1967), 18 L. Ed. 2d 847, 863 (1967); *Greyhound Lines, Inc.* v. *U. S.* 268 F. Supp. 746 (N. D. Ill. E. D. 1967); *Crescent Liquor Co.* v. *Platt*, 148 Fed. 894, 900-902 (N. D. W. Va. 1906).

2. The argument that the Commission has promulgated a new policy radically limiting the right of motor common carriers of property under Section 216 (c) to voluntarily establish through-route, joint-rate and interchange arrangements is without foundation. This case does not involve a Commission order directing the initial establishment of through routes, joint rates and interchange arrangements. On the contrary it involves a Commission order directing Associated to cancel a restrictive tariff

provision found to be in violation of Sections 216 (b) and (d) of the Interstate Commerce Act. The effect of the order of cancellation is to require Associated to re-establish services which had been in effect before the restrictive tariff provision was published. The initial establishment of such services by Associated was a voluntary act on its part. The initial establishment of such services was not ordered by the Commission.

The uncontroverted facts of record indicate that the cancellation by Associated of its long established through-routes, joint-rates and interchange arrangements on furniture caused severe economic hardship on furniture shippers which had long relied on such services. In this context Associated's restrictive tariff provision was ordered cancelled by the Commission as being in violation of Sections 216 (b) and (d). Clearly, therefore, the Commission's order does not involve the initial establishment of such services. Nor is it a new policy for the Commission to seek to prevent and correct unreasonable practices under Section 216 (b) and unjust discriminations and unreasonable preferences and prejudices under Section 216 (d).

The Commission's decision also involves a request to its Suspension Board to suspend on its own motion similar restrictive tariff provisions which may be filed in the future. This is consistent with the specific suspension powers granted to the Commission in Section 216 (g) of the Interstate Commerce Act. If, after suspension, the carriers involved establish that their tariff provisions do not violate provisions of the Interstate Commerce Act, presumably their tariff provisions will be allowed to take effect.

3. The argument that the Commission's decision rests upon the proposition that for a motor common carrier to

hold out through-route, joint-rate and interchange arrangements on some authorized commodities and not on others is *per se* unlawful is a clear misinterpretation of the Commission's decision. The Commission indicates at 332 I.C.C. 814 (J. S. 21a, 22a) that it has made no such broad interpretation of a common carrier's responsibilities under Section 216 (c). In addition, the court below also refused to go this far in its interpretation of a common carrier's responsibilities (J. S. 3a).

4. The argument that the Commission's decision is an abrupt reversal of a long line of decisions which held that Section 216 (c) of the Interstate Commerce Act is permissive and that through-route, joint-rate and interchange arrangements may be voluntarily established or withdrawn, is without merit. As the Commission indicates at 332 I.C.C. 813 (J. S. 21a) ". . . there is nothing in our prior reports which prevents us from ending unreasonable practices of the kind found to exist here." Compare *American Trucking Associations, Inc., et al.* v. *Atchison, T. & S. F. Ry.*, 387 U. S. 399, 416 (1967).

5. The Commission's decision and order, and the decision of the court below, were and are just and proper. The voluntary and permissive provisions of Section 216 (c) cannot be used by common carriers to discriminate unjustly, *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.* 387 U. S. 399 (1967), nor can they be used to cancel arbitrarily those services on which shippers have come to rely. *Greyhound Lines, Inc.* v. *U. S.* 268 F. Supp. 746 (N. D. Ill. E. D. 1967). The voluntary and permissive provisions of Section 216 (c) of the Interstate Commerce Act do not give motor common carriers of property a license to violate Sections 216 (b) and (d) of the Interstate Commerce Act. The uncontroverted facts

of record indicate that Sections 216 (b) and (d) have been violated by Associated. If motor carriers of property are not prevented from violating Sections 216 (b) and (d) as a result of their exploitation of the voluntary and permissive provisions of Section 216 (c) the objectives of the National Transportation Policy will never be realized. That serious consequences inevitably will be the result have been recognized both by the Commission and the court below. (332 I.C.C. at 812, J. S. 19a, 20a.) See also *Crescent Liquor Co.* v. *Platt*, 148 Fed. 894, 900–902.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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